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ALEXANDER L. STEVAS,
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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROY SNEAD, JR., SHERIFF, AND
FORREST DOBBINS, CLERK OF THE
CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA,

Petitioners

V.

J. L. STRINGER, ALSO KNOWN AS
REV. JUDGE L. STRINGER,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

OFFICE OF ATTORNEY GENERAL
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

1. Where a public official is under indictment and remains active in office pending trial, do the constitutional rights of such an official as an indictee extend to public records in his custody by reason of his office so that a prosecutorial officials must receive the consent of the indictee's attorney before contacting the indictee concerning such records?

2. Does the rule of Massiah v. United States (377 U.S. 201 [1964]) apply to statements of indictees which are not intentionally elicited?

3. In a habeas corpus action by a State prisoner under 28 U.S.C. 2254, may a Federal District Court set aside a state court finding that certain evidence was sufficient to take a question of

state law to the jury, where there is substantial evidence in support of such point?

PARTIES

In the United States District Court for the Middle District of Alabama and the United States Court of Appeals for the Fifth Circuit the parties were J. L. Stringer, Respondent herein, and Roy Snead, Jr., Sheriff, and Forrest Dobbins, Clerk of the Circuit Court, of Calhoun County, Alabama, Petitioners herein. The real party in interest was and is the State of Alabama.

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OPINIONS BELOW

None of the opinions of the lower Federal Courts are published.

The judgment and opinion of the United States District Court is submitted as Appendix "A" hereto.

The orders without opinions of the United States Court of Appeals are submitted as Appendix "B" hereto.

JURISDICTION

The order of the United States Court of Appeals affirming without opinion the District Court's granting of the writ was issued on March 4, 1981. Rehearing was denied on April 9, 1981, and this petition is filed within ninety days of that date.

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1224 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States, in particular that portion which reads:

> "In all criminal prosecutions, the accused shall enjoy the right. . .to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States, in particular that portion which reads:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

At all times relevant to this case, the Respondent, Rev. Judge L. Stringer, was Mayor of Hobson City, Alabama.[1] In 1977 Mayor Stringer was indicted by the Grand Jury of Calhoun County, Alabama, for forging the endorsement on a check issued by Hobson City and for embezzeling the proceeds of the check. Mayor Stringer's plea was not guilty. (Respondents' Exhibit "A," pages 256-257 and 259)[2]

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[1]Hobson City's 1970 population was 1,124 persons. Population Tables, Vol. 14B, Code of Alabama, 1940 (recomp. 1958)

[2]No record page numbers are marked on this Exhibit "A.", which is the state trial transcript. For this reason the page references are to those of the State transcript which are marked and, therefore, should be more convenient to this Honorable Court.

On the trial of the cause, as the last State's witness, the District Attorney was called to the stand to testify. The jury was excluded and the State trial court conducted a full hearing on the matter at issue in this case. The District Attorney testified that after the indictment had been returned, although he could not remember the exact date, he called Mayor Stringer at the Mayor's office on the telephone and inquired about the possibility of obtaining handwriting exemplars from city records. The Mayor stated that the District Attorney was welcome to the records. The Mayor went on and volunteered that it was not necessary, because he had signed the endorsement in question.[3] The trial judge asked the defense if they wanted to call any

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[3]The admissibility of this volunteered unsolicited statement by Mayor Stringer is the basic issue in this litigation.

witnesses; the offer was declined. The trial court overruled Mayor Stringer's objection which was based on the failure to give Miranda warnings and the evidence was permitted to go to the jury. (Respondents' Exhibit "A," pages 112-121)

Mayor Stringer was acquitted of forgery of the endorsement but convicted of embezzlement and sentenced to one (1) year and one (1) day imprisonment. (Respondents' Exhibit "A," pages 282-283)

Appeal was taken to the Court of Criminal Appeals of Alabama, which affirmed the conviction. With regard to the matters at issue here the Court of Criminal Appeals found that Mayor Stringer's admission was volunteered[4]

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[4]". . .the admission was a volunteere' statement, not in response to a question calling for such an answer. . ." Stringer v. State, (Cr. App. Ala., 1979) 372 So. 2d 378, 382; App. "C," p. 27a.

and, in any event, its admission, if error, was harmless.[5] Stringer v. State (Cr. App. Ala., 1979) 372 So. 2d 378; Appendix "C". In deciding the harmless error question, the Alabama Court of Appeals took for granted the proposition that, even without the testimony of the District Attorney, the evidence against Mayor Stringer was sufficient to present a case for the jury.[6]

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[5]. . ."Moreover, the Appellant [Mayor Stringer] testified at trial that he signed William Malone's name to the check. In fact his whole defense was that he had Malone's permission to sign the check. . . ." Ibid 372 So. 2d 378, 383; App. "C," p. 31a

[6]The Opinion discusses the evidence at two points: In a general digest (372 So. 2d 378, 379-380; App. "C," pp. 15a-17a) and in analyzing the sufficiency of the evidence. (372 So. 2d 378, 383; App. "C" pp. 32a). At neither point does the opinion mention the District Attorney's testimony, although the Court of Appeals was well aware of it. (e.g. 372 So. 2d 378, 381-383; App. "C," pp. 22a-32a)

Review was sought in and denied by the Alabama Supreme Court. Ex parte: Stringer (S. Ct. Ala., 1979) 372 So. 2d 384, App. C, p. 36a.

On October 19, 1979, the instant proceedings were initiated in the United States District Court for the Northern District of Alabama. On October 22, 1979, the Respondents were ordered to show cause why the writ should not issue. In response, the Respondents avered that Mayor Stringer's admission was volunteered and that the introduction of the evidence was harmless because, (1) the Mayor admitted endorsing the check incident to his defense and (2) the Mayor was acquitted of forgery. (R. pp. 1-14)

The Respondents also submitted the entire transcript of State proceedings. (Respondents' Exhibit "A.")

On January 14, 1980, the United States Magistrate recommended that the writ be issued. (R. pp. 38-44)

The Respondents objected to the Magistrate's recommendation. (R. pp. 48-52)

On May 1, 1980, the District Court rejected the magistrate's findings that the District Attorney's telephone call was "ostensibly" for the obtaining of handwriting exemplars. The Court expressly found that the District Attorney had no "improper motive" in making the telephone call. (R. p. 55) However, the court ordered the writ issued, because the court held that Massiah v. United States (377 U.S. 201 [1964]) barred all counselless contacts of indictees by prosecutorial officials. (R. pp. 53-57) The District Court also found that the District Attorney's evidence was harmful

because without that testimony there was allegedly not sufficient evidence to take the case to the jury. (R. pp. 53-57, Appendix "A," pp. 2a-10a)

Appeal was taken to the United States Court of Appeals for the Fifth Circuit raising the matters at issue here. On March 4, 1989, the U.S. Court of Appeals affirmed ". . .for the reasons set forth in the District Court's memorandum opinion. . . ." (Appendix "B", pp. 11a-12a)

The Respondents' applied for rehearing en bank, which was denied on April 9, 1981. (Appendix "B", pp. 12a-14a)

STATEMENT OF THE FACTS

In the interest of brevity, the Respondents will rely on the facts as stated by the District Court, adding only

those essential facts shown without conflict and not mentioned by the District Court.

I.

ON THE CONSTITUTIONAL ISSUES

The District Attorney testified that he called Mayor Stringer at his office at city hall about the possibility of obtaining handwriting exemplars from city records. He testified in pertinent part as follows:

> "Q. Would you relate the substance of that conversation to us, please, sir, what the purpose of your call was?
>
> "[A.] I asked Mayor Stringer if he would be willing to, through records down there at City Hall, provide me with samples of his handwriting and Donald Malone's handwriting and William Malone's handwriting. . . ." (Respondents' Exhibit "A," page 119)

* * * *

"Q. What was Mayor Stringer's reply to you, please?

"A. He was willing to give me those records. He said that I was welcome to have whatever records that I wanted but he said he felt like it was unnecessary because he had signed William Malone's name to the back of the check as well as his own. . . ." (Respondents' Exhibit "A," page 120)

On this point the District Court found:

"...Briefly stated, the prosecuting attorney contacted the petitioner directly by telephone to ascertain the availability of handwriting exemplars of the petitioner. During this conversation, the petitioner admitted to the prosecuting attorney that the petitioner himself placed the questioned payees' endorsements on the checks in question. In his Recommendation to this court, the magistrate characterized the prosecuting attorney's call to the petitioner in the following manner. The magistrate stated that the prosecuting attorney called the petitioner for the ostensible purpose of securing handwriting exemplars. The respondents strenuously object to characterizing this call as "ostensible." To this extent,

the objection by the respondents is sustained. This court concludes that the magistrate chose an incorrect adjective to describe the purpose of the call made by the prosecuting attorney. This court finds that there was no improper motive in the prosecuting attorney's contacting petitioner. The court also concludes that there is no reason to consider any alleged question of ethics as urged by petitioner's attorney in this action. . ." (Respondent's Appendix "A," pp. 8a-9a)

II.

ON HARMLESS ERROR

On this issue the District Court found:

"...This court has reviewed a transcript of the testimony at petitioner's trial and finds in accordance with the magistrate's Recommendation that the witnesses for the prosecution Robert Wayne Underwood, William A. Malone, Billy W. Moore and Donald Ray Malone establish the following essential facts and none other. The checks in question which were the basis for Forgery and Embezzlement charges against the petitioner were negotiated and each check contained the signature of the

> payee and petitioner J. L. Stringer. The payees denied receipt of any proceeds and denied authorizing anyone to endorse the checks in their names. The petitioner in a pretrial interview denied any responsibility for the questioned endorsements...." (Appendix "A," p. 5a)

To this, the following must be added:

The interview which the District Court referred to was in fact a four way conversation between Mayor Stringer, his lawyer and two state investigators; it was not only "pre-trial" but pre-indictment and pre-arrest as well. The interview required twelve transcript pages to transcribe. (Respondents' Exhibit "A," pages 70-81) In this interview Mayor Stringer not only "denied any responsibility for the questioned endorsements," but stated:

1. The check in question was issued over his signature as Mayor. (Respondent's Exhibit "A," page 73)

2. The first endorsement, "William Malone," was either signed by William Malone or his brother Don Malone. (E.g., Respondent's Exhibit "A," pages 71-72 and 74)

3. The second endorsement was by himself, Mayor Stringer. (Ibid)

4. Most importantly, the Mayor acknowledged depositing the checks in his own account. The Mayor stated:

> "VOICE #1 [Investigator Simpson]: All right, Mayor, I'm going to ask you one more question here. On the back of those checks, your signature appears on them. Did you cash those checks, or how did your signature come to appear as the last endorser on those checks before they went to the bank?
>
> "VOICE #2 [Mayor Stringer]: Because of, in most instances, at that time those funds in that particular account, if you will check the bank statements, I'm sure that the dates that

> those checks were written, chances are there was not enough funds in that account. I cashed those funds out of my pocket and, in turn, when the City---We knew that we owed the grant their money, so once the City got the money, and I authorized my secretary to replace the funds back in there so we could clear that particular grant out, and I would run those checks through, so that's how my name appears on the checks." (Respondents' Exhibit "A," page 77)

SUMMARY OF THE ARGUMENT

I. An accused public official's constitutional rights as an accused person do not extent to public records under his control by reason of his office. Constitutional rights are personal. Alderman v. United States, 394 U.S. 165, 174, 22 L. Ed. 2d 176, 187, 89 S. Ct. 961 (1969); Communist Party, etc. v. Subversive Activities Control Board, 367 U.S. 1, 107, 6 L. Ed. 2d 625, 695, 81 S. Ct. 1357 (1961) To extend the Constitutional

rights of accused public officials to the incidents of their offices would give such officials control over their prosecutions which is denied by the ordinary accused, contrary to the Constitutional policy of our nation. This Honorable Court has never had and will seldom have an opportunity to address this important Constitutional question.

II. The holding in this case extends the rule of Massiah v. United States to an admission which was neither solicited nor expected. This is contrary to the plain language of this Honorable Court in: Massiah v. United States (377 U.S. 201, 206, 12 L. Ed. 2d 246, 250, 84 S. Ct. 1119 [1964]) and numerous other cases.

III. There was, outside of the District Attorney's testimony, strong evidence from which a rational trier of

fact could have found Mayor Stringer guilty, and the State courts so found. In holding that the District Attorney's evidence was harmful to Mayor Stringer even though the Mayor admitted the substance of the District Attorney's testimony, the District Court rejected the State court finding on the sufficiency of the evidence. In so doing the District Court ruled contrary to this Honorable Court's opinion in Jackson v. Virginia (443 U.S. 307, 319; 61 L. Ed. 2d 560, 573; 99 S. Ct. 2781 [1979]).

ARGUMENT

I.

AN INDICTED PUBLIC OFFICIAL'S RIGHTS AS AN ACCUSED PERSON DO NOT EXTEND TO PUBLIC RECORDS UNDER THE OFFICIAL'S CONTROL BY REASON OF HIS OFFICE

Mayor Stringer chose to remain active in his Office during the pendency of the indictment. It was this situation which led the District Attorney to call Mayor Stringer about the city records. That the District Attorney's call was about city records has never been seriously questioned, and the District Court expressly found that the District Attorney had no "improper motive" in calling Mayor Stringer. (R. p. 55) Yet, the District Court held that Massiah v. United States (377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1119 [1964]) bars all counselless contacts with indictees and that the District Attorney should have gotten the consent of Mayor Stringer's

attorney before contacting the Mayor about public records.

When seeking public records of small towns, such as Hobson City, Alabama, one normally contacts the mayor. If one were to contact anyone else, he would be referred to the mayor. Thus, if the Mayor had not been under indictment, no question would have been raised by the District Attorney's call; it would have been the normal, natural thing to do. On the other hand, if the call had produced only the records the District Attorney sought, would anyone have suggested that the records would not have been admissible? Constitutional rights are personal, and Mayor Stringer's rights obviously did not extend to public records under his control by reason of his office. Alderman v. United States, 394 U.S. 165, 174, 22 L. Ed. 2d 176, 187, 89 S. Ct. 961 (1969); Communist Party of The United

States v. Subversive Activities Control Board, 367 U.S. 1, 107, 6 L. Ed. 2d 625, 695, 81 S. Ct. 1357 (1961). Clearly, these records would have had no more constitutional protection than Mayor Stringer's own bank records. See United States v. Miller, 425 U.S. 435, 48 L. Ed. 2d 71, 96 S. Ct. 1619 (1976)

The holding of the District Court and the Court of Appeals in this case has the effect of extending the Massiah Rule to public records which are in the custody of an indictee by reason of a public office. By necessary implication, all other constitutional rights would be similarly extended. Thus, an indicted public official, having no Fourth Amendment rights with regard to his own bank records (Miller, above), would have Fourth Amendment rights with regard to public records in his custody by reason

of his office. This would give indicted public officials control over their prosecutions which is denied to the ordinary accused. It would grant to public officials personal constitutional privileges contrary to the clear policy of the Constitution. See, for example, U.S. Constitution, Art. 1, Section 9, Clause 8 and The Equal Protection Clause of the Fourteenth Amendment.

REASON FOR GRANTING THE WRIT: NOVEL QUESTION

None of this Honorable Court's decisions on the Massiah Rule relate to public officials or public records. In fact, the Petitioner has not been able to find a single case on this point anywhere in the country. In the instant case the Petitioner tried diligently to get the District Court and the Court of Appeals to address the obvious difference between

a private citizen who is covertly interrogated while free on bond[7] or in jail[8] or overtly interrogated in the back of a speeding police car[9] and a Mayor who is openly contacted by telephone at his office about public records. Yet, both Courts declined to examine this obvious distinction.

The chances are that it will be a long time before this Honorable Court gets another oportunity to address these questions. Yet, as discussed above, at issue here are some of our most basic constitutional policies. The question of a public official's Constitutional rights with regard to public records is an

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[7] Massiah v. United States, 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964)

[8] United States v. Henry, ___ U.S. ___, 65 L. Ed. 2d 115, 100 S. Ct. ___ (1980)

[9] Brewer v. Williams, 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977)

extremely important one, which cries out for resolution.

II.

THE MASSIAH RULE DOES NOT APPLY TO STATEMENTS WHICH ARE NOT INTENTIONALLY ELICITED

The District Court erred in two ways with regard to the Massiah Rule. First, the District Court viewed Massiah as barring all uncounseled contacts between indictees and prosecutorial officials. Second, the District Court viewed Massiah as an exclusionary rule rather than a rule of substance.[10]

REASON FOR GRANTING THE WRIT: CONFLICT WITH PRIOR DECISIONS

The evidence in this case showed without conflict that the District

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[10]If the Massiah Rule is an exclusionary rule it could not be raised by habeas corpus; Stone v. Powell, 428 U.S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976).

Attorney called Mayor Stringer about public records and received an unsolicited and unexpected admission against interest. The District Court and Court of Appeals found that allowing this admission into evidence violated Massiah v. United States 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 [1964]).

The key to the decisions of the lower courts is the idea that Massiah bars all counselless contacts between indictees and prosecutorial officials. Yet, the only time this Honorable Court has ever mentioned contacts other than for the purpose of obtaining a statement was in footnote 14 of the United States v. Henry (___ U.S. ___, 65 L. Ed. 2d 115, 125, 100 S. Ct. ___ [1980]). On that occasion this court prefaced the reference with: "Although it does not bear on the Constitutional issues in this case. . ."

The Massiah Rule was stated thusly:

> ". . .We hold that the petitioner was denied the basic protections of that [Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he was indicted and in the absence of his counsel. . . ." (377 U.S. 201, 206, 12 L. Ed. 2d 246, 250) (Emphasis supplied)

In Massiah and every case following it this Honorable Court has gone to lengths to point out that it was the intentional elicitation of the statement which violated the Constitution not the mere contact. See Massiah v. United States (377 U.S. 201, 206, 12 L. Ed. 2d 246, 250, 84 S. Ct. 1119 [1964]); Brewer v. Williams (430 U.S. 387, 399 ff, 51 L. Ed. 2d 424, 436 ff, 97 S. Ct. 1232 [1977]) and United States v. Henry (___ U.S. ___, 65 L. Ed. 2d 115, 122 ff., 100 S. Ct. ___ [1980]) If what was intended by Massiah

was the barring of all contacts, it would seem that this Honorable Court would have said so, rather than discussing the problem of deliberate elicitation in case after case.

In the instant case, the District Attorney contacted Mayor Stringer in the lattor's capacity as mayor about city records. The District Attorney's question involved a matter of city administration not law. The inquiry was by telephone between two public officials each in his respective office. The nature of the inquiry was not such as would cause the Mayor to have to cope with legal problems or meet an adversary situation. See United States v. Ash, 413 U.S. 300, 37 L. Ed. 2d 619, 93 S. Ct. 2568 (1973) The Mayor responded to the inquiry, and then, added the admission at issue here. The admission was neither solicited nor ex-

pected. However "intentional elicitation" is defined, what happened here falls well beyond that definition.

In holding that ther Massiah Rule barred the introduction of this patently unsolicited admission, the Honorable Courts below ruled contrary to the prior decisions of this Honorable Court.

III.

THE DISTRICT COURT ERRED IN SETTING ASIDE THE STATE COURT FINDING OF HARMLESS ERROR ON STATE LAW GROUNDS

The question of harmless error as to a Federal Constitutional right is normally a Federal Question. However, in the instant case we have the situation where the State offers questionable evidence to prove "x" and the Defendant admits "x." This is classic harmless error under any standards. Yet, in the instant case, the District Court found that

District Attorney's evidence was harmful even though it proved only a fact that Mayor Stringer later admitted. To reach this conclusion, the District Court found that without the District Attorney's testimony, there would not have been sufficient evidence to take the case to the jury. In so ruling the District Court rejected the finding of the State Courts on this same point. And, the question of the sufficiency of the evidence is basically a question of State law.

In arriving at this conclusion, the District Court took the twelve page transcript of Mayor Stringer's pre-arrest interview and reduced it to a sentence: ". . .The petitioner in a pretrial interview denied any responsibility for the questioned endorsements. . . ." (Appendix "A," pp. 5a-6a) If this interview was limited to a denial of responsibility for the endorsement, it would not have

been admissible in the case by either party. From Mayor Stringer's point of view, it would have been an extra judicial self-serving declaration; from the State's point of view, it would have been exculpatory only. But, this interview contained much, much more. In it, Mayor Stringer traced the check from its issuance by him for the City until he deposited it in his account. This interview was the center piece of the State's case. The State's case consisted of the transcript of this interview and other evidence showing that the Mayor's statement was true at some points (i.e. The Mayor did issue the check for the City and did ultimately deposit it in his account and receive credit for it.) And false at others (i.e. The check was not for a city obligation and neither William nor Don Malone ever endorsed the check, recieve any value for it or even see the

check before Mayor Stringer deposited it.) Proof that a public official drew a check on public funds for a non-existent obligation and deposited it in his account, would seem to be well sufficient to prove embezzlement. As to the forgery case: The fact that the Mayor had claimed in his interview that either William or Don Malone endorsed "William Malone" on the check before Mayor Stringer deposited it, coupled with the denials of the Malone brothers, would seem sufficient to take the forgery case to the Jury. The District Attorney's evidence may have made the forgery case a bit stronger, but Mayor Stringer was acquitted of forgery!

Most importantly, the State courts considered the sufficiency of the evidence and found it sufficient <u>without the District Attorney's testimony</u>. <u>Stringer v. State</u> (Cr. App. Ala., 1979)

372 So. 2d 378, 383; Appendix "C" p. 32a).

REASON FOR GRANTING THE WRIT: CONFLICT WITH PRIOR DECISIONS

This Honorable Court has often recognized that the question of the sufficiency of the evidence is a question of state law. Most recently in Jackson v. Virginia (443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 [1979]) this Honorable Court set the Constitutional standard for evidence sufficient to take a case to the jury:

> ". . .[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (443 U.S. 307, 319, 61 L. Ed. 2d 560, 573)

Clearly, the evidence outlined above would have authorized a rational trier of

fact in finding embezzlement. The State Courts found this evidence sufficient, without reference to the prosecutor's evidence. The District Attorney's evidence was not essential to the State's making out a prima facie case; and the State Courts so found. Therefore, the District Court ruled contrary to the prior rulings of this Honorable Court in setting aside the State Court finding of sufficiency.

CONCLUSION

In conclusion the Petitioners respectfully submit that this case presents an important question of Federal Constitutional Law which has not been but ought to be decided by this Honorable Court and conflicts with prior opinions. For these reasons the Petitioners pray that this Honorable Court will issue the writ of certiorari and review the decision and opinion of the Honorable Court of Appeals and on such review will reverse the decision of said Court.

Respectfully submitted,

/S/

CHARLES A. GRADDICK
ATTORNEY GENERAL

/S/

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Sheriff Snead and Forrest Dobbins, Petitioners, do hereby certify that on this 28th day of May, 1981, I did serve the requisite number of copies of the foregoing on the Attorney for J. L. Stringer, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

Honorable Charles A. Sullins
Attorney at Law
206 Randolph Avenue, S.E.
Huntsville, Alabama 35801

/s/
JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130

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V.

J. L. STRINGER, ALSO KNOWN AS
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APPENDIX

TO THE PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONERS

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A P P E N D I C I E S

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

J. L. STRINGER, also known as REV. JUDGE L. STRINGER,	)	
Petitioner,	)	
-Vs-	)	CV-79-A-1162-E
ROY SNEAD, JR., Sheriff of Calhoun County, Alabama, and FORREST DOBBINS, Clerk of the Circuit Court of Calhoun County, Alabama,	)	
Respondents.	)	

J U D G M E N T

In accordance with the Memorandum Opinion filed contemporaneously herewith,

It is hereby ORDERED, ADJUDGED and DECREED that the petition for habeas corpus filed by J. L. Stringer be and the

same hereby is GRANTED subject to the right of the State of Alabama to retry petitioner within a reasonable time.

DONE, this 1st day of May, 1980.

s/C. W. ALLGOOD
SENIOR JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

J. L. STRINGER, also known as REV. JUDGE L. STRINGER,	)	
Petitioner,	)	
-Vs-	)	CV-79-A-1162-E
ROY SNEAD, JR., Sheriff of Calhoun County, Alabama, and FORREST DOBBINS, Clerk of the Circuit Court of Calhoun County, Alabama,	)	
Respondents.	)	

MEMORANDUM OPINION

J. L. Stringer, hereinafter referred to as the petitioner, has submitted to this court a petition for habeas corpus in which he attacks the validity of his conviction in the Circuit Court of Calhoun County, Alabama. In accordance with the practices of this court, this matter was initally referred to a United States Magistrate. The magistrate required the respondents to respond to a Show Cause Order; and after all pleadings had been filed, the magistrate submitted a Recommendation to the district court. The magistrate recommended that the petition for habeas corpus be granted based upon the principle ennunciated by the Supreme Court of the United States in Massiah v. United States, 377 U.S. 201 (1964) and Beatty v. United States, 389 U.S. 485.

The essential facts in this case have been discussed in detail in the magistrate's Recommendation and will not be repeated here. The court finds that the facts which appear in the magistrate's Recommendation are ample support for the record. After receiving the magistrate's Recommendation, the respondents have filed objections to the magistrate's Recommendation.

As explained in detail in the magistrate's Recommendation, the decisive issue in this case is whether a contact made by a state official with the petitioner after the return of the indictment and after petitioner was represented by attorney of record constituted a violation of the petitioner's right to counsel as described in Massiah v. United States, supra. A subsidiary issue is, If a Massiah-type violation has occurred, is

it harmless error? Chapman v. California, 386 U.S. 18 (1967); United States v. Anderson, 523 F. 2d 1192 (5th Cir. 1975).

This court has reviewed a transcript of the testimony at petitioner's trial and finds in accordance with the magistrate's Recommendation that the witnesses for the prosecution Robert Wayne Underwood, William A. Malone, Billy W. Moore and Donald Ray Malone establish the following essential facts and none other. The checks in question which were the basis for Forgery and Embezzlement charges against the petitioner were negotiated and each check contained the signature of the payee and petitioner J. L. Stringer. The payees denied receipt of any proceeds and denied authorizing anyone to endorse the checks in their names. The petitioner in a pretrial interview denied any responsibility for the questioned endorsements.

Up to this point, the prosecution had not established its case against the petitioner except in an extremely tenuous circumstantial fashion. At this point, the presecuting attorney took the stand as a witness and testified to an incriminating statement made by petitioner to the prosecuting attorney in response to a telephone call. The statements made by petitioner to the prosecuting attorney were, in fact, a confession that petitioner had himself palced the questioned endorsements of the payees on the checks in question. As pointed out in the magistrate's Recommendation, this confession took place after petitioner was indicted, after petitioner was represented by an attorney, and that the prosecuting official who made the telephone call was aware of the fact and identity of petitioner's attorney of record. The court concludes that the securing of an

incriminating statement from a defendant who was represented by counsel after indictment in the absence of presence of defense counsel or a waiver thereof is a deprivation of such a defendant's right to counsel as that right is described in Massiah v. United States, supra. Due to the fact that without the evidence obtained by the prosecuting official the State's case would have likely failed, it is impossible to conclude that the obtaining of this statement was harmless error.

The details of the telephone contact made by the prosecuting official to the petitioner are set out in the magistrate's Recommendation. Briefly stated, the prosecuting attorney contacted the petitioner directly by telephone to ascertain the availability of handwriting exemplars of the petitioner. During this conversation, the petitioner admitted to

the prosecuting attorney that the petitioner himself placed the questioned payees' endorsements on the checks in question. In his Recommendation to this court, the magistrate characterized the prosecuting attorney's call to the petitioner in the following manner. The magistrate stated that the prosecuting attorney called the petitioner for the ostensible purpose of securing handwriting exemplars. The respondents strenuously object to characterizing this call as "ostensible." To this extent, the objection by the respondents is sustained. This court concludes that the magistrate chose an incorrect adjective to describe the purpose of the call made by the prosecuting attorney. This court finds that there was no improper motive in the prosecuting attorney's contacting petitioner. The court also concludes that there is no reason to consider any alleg-

ed question of ethics as urged by petitioner's attorney in this action.

This court is not unmindful of the problem presented to the prosecutor in this case. Prosecuting officials and trial judges acting with absolute good faith and sincerity oftentimes take acts which run afoul of principles of law declared by the Supreme Court of the United States. This court found itself in the same position in Beatty v. United States, supra. In the Beatty case, this court's decision in a similar state of facts was reversed by the Supreme Court of the United States based upon Massiah v. United States, supra.

In conclusion, this court accepts the Recommendation of the United States Magistrate as modified herein and finds that the conviction of petitioner in the Circuit Court of Calhoun County, Alabama was obtained in violation of his right to

counsel as that right is described in Massiah v. United States, supra, and that the petition for habeas corpus is due to be granted subject to the right of the State of Alabama to retry petitioner within a reasonable time. An appropriate Judgment will be entered.

DONE, this 1st day of May, 1980.

/s/C. W. ALLGOOD
SENIOR JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

NO. 80-7401

J. L. STRINGER, also known as
REV. JUDGE L. STRINGER,

Petitioner-Appellee,

v.

ROY SNEAD, JR., Sheriff of
Calhoun County, Alabama,
ET AL., Etc.,

Respondents-Appellants.

Appeal from the United States District
Court for the Middle District of Alabama

Before GODBOLD, Chief Judge, MORGAN and HENDERSON, Circuit Judges.

PER CURIAM:

We have heard oral argument and carefully examined the record and the briefs in this appeal. We affirm the grant of habeas corpus relief for the reasons set forth in the district court's memorandum opinion.

A F F I R M E D.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 80-7401

J. L. STRINGER,
also known as
REV. JUDGE L.
STRINGER,

Petitioner-Appellee,

versus

ROY SNEAD, JR.,
Sheriff of Calhoun
County, Alabama,
ET AL., Etc.,

Respondents-Appellants.

Appeal from the United States
District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion MARCH 4, 1981, 5 Cir., 198_,____ F.2d ____).

(April 9, 1981)

Before GODBOLD, Chief Judge, MORGAN and

HENDERSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution

of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX C

372 So. 2d 378-384

J. L. STRINGER, alias

v.

STATE.

7 Div. 623.

Court of Criminal Appeals of Alabama.

March 27, 1979.

Rehearing Denied May 1, 1979.

BOOKOUT, Judge.

Embezzlement, sentence: one year and one day imprisonment.

The appellant, Mayor of Hobson City, Alabama, was indicted by the October 1977 Grand Jury of Calhoun County on one count of forgery and one count of embezzlement. Both charges involved a check in the amount of $171.69 dated October 31, 1974, issued by the town of Hobson City to

William Malone. The check was signed by the appellant and the City Clerk, Margaret [380] Ball, and was endorsed in the names of William Malone and the appellant.

William Malone testified that he had previously been employed by Hobson City as the fire chief. He left the employment of Hobson City in September 1974 and moved out of state. He testified that he was not working for Hobson City at the time the check was issued, and that he did not receive any proceeds of the October 31, 1974 check. William Malone testified that he did not endorse his name on the check, nor did he give the appellant permission to endorse his name on any check.

The appellant testified that William Malone's salary as fire chief had been paid through a federal grant program made available by the state. He said that in

September 1974 William Malone was having some personal problems in Tennessee and had to stay in Tennessee periodically to take care of the problems. Don Malone, William Malone's brother, asked the appellant if he could work gratuitously in the place of his brother during the times that he would be absent so that William Malone would continue to be paid. Appellant testified that, since there was only a few pay periods left under the federal grant contract, he agreed. He testified that as per the agreement he had William Malone's permission to endorse his name on the checks and turn the proceeds over to Don Malone.

Don Malone testified that he did not receive the proceeds from the October 31, 1974 check. The State also introduced in evidence a statement made by the appellant wherein he denied endorsing William Malone's name to the check.

I

Appellant contends that Count I of the indictment charging him with forgery of a check was insufficient as to place him on notice of whether he was to be prosecuted for first degree forgery or second degree forgery.

Appellant was indicted under a two count indictment, but was convicted only of the embezzlement count thereby acquitting him of the forgery count. Liner v. State, Ala. Cr. App., 350 So. 2d 760 (1977). This court will not consider alleged errors pertaining to a count as to which there was an acquittal. Only the count upon which an appellant is found guilty is subject to review on appeal. Hammond v. State, Ala. Cr. App., 354 So. 2d 280, cert. denied, Ala., 354 So. 2d 294 (1977); Liner, supra.

II

Appellant claims that the embezzlement count of the indictment did not sufficiently inform him of what he was being charged of embezzling.

The proper procedure to challenge the validity of an indictment is by demurrer. Andrews v. State, Ala. Cr. App., 344 So. 2d 533, cert. denied, Ala., 344 So. 2d 538 (1977). This the appellant did not do, and he now raises this issue for the first time of appeal. Ordinarily one waives any irregularities in the indictment by appearing and pleading in the trial court, and a plea to the merits is considered as an admission of a valid indictment. Johnson v. State, 49 Ala. App. 389, 272 So. 2d 597 (1973); Elliott v. State, 39 Ala. App. 314, 98 So. 2d 618 (1957). "However, due process dictates that a defect associated with an essential element of the offense which leaves

the accused unaware of the nature and cause of the charge against him cannot be waived by failure to timely demur." Andrews v. State, supra. Such a fatal defect is not present in the instant indictment.

The appellant specifically contends that the indictment does not allege in which jurisdiction the offense was committed, does not allege appellant's official capacity, his control of monies, or that the monies belonged to any municipality. The pertinent portion of Count II of the indictment states that:

> "The Grand Jury of Calhoun County further charge that, before the finding of this indictment, J. L. Stringer, also known as Judge L. Stringer, whose true name is to the Grand jury otherwise un-[381] known, Mayor of Hobson City, Alabama, a city incorporated under the laws of the state, embezzled or fraudulently converted to his own use a check in the amount of $171.69, which said check

> represented funds belonging to or under the control of said city...."

First, it is unnecessary to allege in an indictment where the offense was committed. Title 15 §238, Code of Ala. 1940 (§15-8-31, Code of Ala. 1975). Second, it is plainly stated that appellant is "Mayor of Hobson City" and that the "check represented funds belonging to or under the control of said city." Count II of the indictment substantially follows both Title 14, §126, Code of Alabama 1940 (§13-3-20, Code of Ala. 1975) and Title 14, §127, Code of Ala., 1940 (§13-3-21, Code of Ala. 1975). It charges every material element of the offense of embezzlement and sufficiently informs appellant of the charge against him. Appellant also contends that the indictment should have charged embezzlement of money and not of a check. Title 14, §146, Code of Ala. 1940 (§13-3-39,

Code of Ala. 1975) states that: "In an indictment for embezzlement . . .it is sufficient to describe the property in general terms, as. . . 'checks' . . . of or about a certain amount."

We find no defect in the indictment rendering it void and subject to challenge in any manner other than by way of demurrer timely filed in the trial court. The appellant failed to file a proper and timely challenge, and no error can thus be attributed to the trial court in this regard. Stehl v. State, 283 Ala. 22, 214 So. 2d 299 (1968).

III

The district attorney called himself as the State's last witness. He was examined by an assistant district attorney. He testified, over appellant's objection, that in a telephone conversation with appellant several months after the indict-

ment had been handed down and approximately four months before trial appellant admitted endorsing William Malone's name as well as his own to the check in question. Appellant claims three issues of error concerning this testimony.

A

Appellant contends that the district attorney should not have been allowed to testify in the case and also continue to prosecute the case. The rule governing such procedure is stated in Maund v. State, 254 Ala. 452, 48 So. 2d 553 (1950):

> ". . . 'Although a prosecuting attorney is competent to testify, his testifying is not approved by the courts except where it is made necessary by the circumstances of the case, and, if he knows before the trial that he will be a necessary witness, he should withdraw and have other counsel prosecute the case. The pro-

> priety of allowing the prosecutor to testify is a matter largely within the trial court's discretion. . . .'"

There is no evidence in the record that the district attorney formed the intention to testify in advance of trial. While we do not encourage testimony by any prosecuting attorney, we cannot go so far as to say the trial court committed reversible error by allowing the prosecutor to testify in this case. One of the examples set out in Maund, supra, where the prosecuting attorney was allowed to testify is "'. . .to show admissions made by the defendant to him. . ..'" That was the circumstances in this case, and we find no abuse of discretion on the part of the trial court in allowing the testimony.

B

The appellant contends that the district attorney should have given him

the Miranda[1] warnings after contacting him and before questioning him when an indictment had been handed down in the case and several months had elapsed since the original Miranda warnings were given.

The prosecutor initiated the telephone call to appellant to ask if appellant would, through city records, provide the district [382] attorney's office with handwriting samples of William and Don Malone and himself for comparison purposes. In answer to the district attorney, the appellant stated that the district attorney's office was welcome to whatever records were needed, but that it was unnecessary because he had signed William Malone's name as well as his own to the back of the check. His response was not in answer to a specific question concerning whether he had signed

---

[1]Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

William Malone's name to the check. Neither was this a "custodial interrogation."

The intention of the Miranda decision was "to prevent oppressive police tactics which violate individual rights and produce involuntary confessions." Schaumberg v. State, 83 Nev. 372, 432 P. 2d 500 (1967). Miranda dealt with custodial police interrogation. Sprinkled throughout Miranda were the phrases: "over-zealous police practices," "police dominated atmosphere," "unfamiliar atmosphere," "menacing police interrogation procedures," and "in-custody questioning.

In the instant case, the district attorney and appellant were in the comfort and privacy of their individual offices. The admission took place during a telephone conversation while the appellant was neither in custody nor subject

to oppressive police tactics. In addition, the admission was a volunteered statement, not in response to a question calling for such an answer. The appellant's freedom of action was not limited or curtailed, and he was free to terminate the conversation at any time. As stated in Miranda (86 S.C. at p. 1630):

> ". . .Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . .Volunterred statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

We do not think the circumstances surrounding appellant's admission substantially affected his individual will to resist.

C

The appellant's last contention concerning the telephone conversation is that his admission should have been

suppressed because the district attorney was under an ethical obligation to contact appellant's attorney before contacting appellant.

In Simpson v. Alabama State Bar, 294 Ala. 52, 311 So. 2d 307 (1975), the Alabama Supreme Court held that district attorneys were not subject to discipline under the disciplinary rules in effect at that time. However, the Court specifically stated the question of whether or not district attorneys could be disciplined under the then proposed Code of Professional Responsibility (now in effect) was not before them.

The Michigan Supreme Court in People v. Green, Mich., 274 N.W. 2d 448 (1979), held that district attorneys are subject to their Code of Professional Responsibility under DR 7-104(A)(1), but held that reversal of a conviction solely because of an ethical violation "would constitute

reprehensible 'overkill.'" Alabama's DR 7-104(A)(1), which is identical to Michigan's, is in pertinent part as follows:

> "DR 7-104 Communicating With One of Adverse Interest.
>
> "(A) During the course of his representation of a client a lawyer shall not:
>
> "(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

Whether the district attorney was under an ethical obligation to contact the appellant's attorneys has no bearing on the admissibility of the statement. Likewise, we find it unnecessary to rule on whether a district attorney is subject to the Alabama Code of Professional Responsibility. As stated in People v. Green, supra:

". . .The provisions of the code [Code of Professional Responsibility] are not constitutional or statutory rights guaranteed to individual persons. They are instead self-imposed internal regulations prescribing the standards of conduct for members of the bar.

. . . . . .

[383]

"The admissibility of evidence in a court of law, on the other hand, is normallly determined by reference to relevant constitutional and statutory provisions, applicable court rules and pertinent common-law doctrine. Codes of professional conduct play no part in such decisions." (Bracketed material added.)

On a similar question, this court in Alexander v. State, Ala. Cr. App., 370 So. 2d 330 [Ms. March 6, 1979], stated:

"'The fact that a defendant has an attorney does not mean, as a per se rule, that law enforcement officials cannot procure a statement of any kind from the defendant without prior notice to, if not the consent of, the attorney.' This rule was fully discussed and applied in Thompson v. State, 347 So. 2d

> 1371 (Ala. Cr. App.), cert. denied, 347 So. 2d 1377 (Ala.1977). In Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 1243, 51 L. Ed. 2d 424 (1977), the United States Supreme Court implicitly rejected any such 'per se' rule."

We have reached the same conclusion in another similar circumstance in Thomas v. State, Ala. Cr. App., 373 So. 2d 1149 (1979).

Moreover, the appellant testified at trial that he signed William Malone's name to the check. In fact his whole defense was that he had Malone's permission to sign the check. Our Supreme Court in Boulden v. State, 278 Ala. 437, 179 So. 2d 20 (1965), stated:

> "We will observe that this court, along with others, has applied the harmless error doctrine to assertions made that the introduction of evidence of confessions should not work a reversal where the defendants had taken the stand and given testimony substantially in the language of the confessions. . . ."

We reached the same result in Jones v. State, 50 Ala. App. 36, 276 So. 2d 621 (1973), and in Thomas, supra.

VI

Appellant contends that the evidence was insufficient to show that municipal funds were unlawfully converted. The State's evidence was that funds were improperly drawn from a city account by appellant for a non-existent obligation. The custodian of the records for the First National Bank of Anniston testified as to the city's account with that bank and identified the check in question as being drawn on the city's account. A microfilmed copy of the October 31, 1974 check was admitted into evidence. Therefore, we think the evidence was sufficient to show a fraudulent conversion of municipal funds. See: Troup v. State, 32 Ala. App. 309, 26 So. 2d 611 (1946).

V

Appellant contends that the trial court improperly allowed into evidence a microfilmed copy of the check upon which this conviction is based. When the microfilmed copy was offered in evidence, the appellant objected on the specific ground that the best evidence rule was violated because the original check was not introduced.

Robert Wayne Underwood testified that he was custodian of the records of the First National Bank of Anniston. He produced and identified a microfilmed copy of a check issued to William Malone by the town of Hobson City dated October 31, 1974. The check was signed by the appellant and City Clerk Margaret Ball. The names of William Malone and appellant were endorsed on the back of the check. Mr. Underwood also identified the Hobson City account number and the type of

account. Although appellant argues at length in his brief as to the insufficiency of the State's predicate for introducing the check, he did not specifically object to the predicate at trial.

We find no error in admitting into evidence a microfilmed copy of a check. Title 5, §145(5), Code of Ala. 1940, as amended (now §5-4-5, Code of Ala. 1975), provides:

> "Any bank may cause, any or all books and records at any time in its custody. . .to be reproduced by. . .microphotographic process. . .and any reproduction so made. . .shall [384] have the samd force and effect as the original thereof and be admitted in evidence equally with the original. . ."

It is a matter of common knowledge that the banks are in the business of handling checking accounts and that copies of cancelled checks are retained by banks during the regular course of their business. They are considered by this court to be

bank records. Appellant courts may take judicial knowledge of matters known to the general public. Coley v. W. P. Brown & Sons Lumber Co., 251 Ala. 235, 37 So. 2d 125 (1948).

VI

A

During the course of the trial, several checks were introduced into evidence to show plan, scheme or motive of appellant concerning the embezzlement of the October 31, 1974 check. The trial court questioned appellant from the bench concerning certain discrepancies in the amounts of the checks. Appellant contends that the trial court erred by placing undue emphasis on those other checks and drawing the jury's attention to them. However, the appellant made no objection to the trial court's questions. This court will not review an alleged error

concerning the questioning of a defendant by the court where no objection was made. Hinkle v. State, 50 Ala. App. 215, 278 So. 2d 218 (1973).

B

Appellant contends that the trial court erred by allowing into evidence a check dated outside the statute of limitations for embezzlement. The check was dated October 15, 1974, and the instant indictment was returned on October 21, 1977.

When the October 15, 1974, check was offered into evidence, appellant stated that he would interpose the "same objection" as previously taken. The previous objection was to the October 31, 1974 check. Clearly that check was not outside the statute of limitations. The previous objection taken was that the check was "irrelevant, incompetent, immaterial, and it violates the best evi-

dence rule." The grounds that evidence is irrelevant, incompetent, and immaterial are general grounds of objection. Murphy v. State, 42 Ala. App. 60, 151 So. 2d 800 (1963). It is obvious that by taking the same objection as taken to the October 31, 1974 check, appellant was not objecting to the statute of limitations issue. The trial court will not be put in error for admitting evidence over a general objection unless the matter is clearly inadmissible for any purpose. Objections to admissions of evidence are unavailing unless appropriate grounds are stated. Rogers v. State, 53 Ala. App. 573, 302 So. 2d 547 (1974). In the case of Troup v. State, supra, evidence of irregularities occurring prior to the three year statute of limitations was properly admitted in that embezzlement case. In any event, no objection was raised on

that ground in the trial court, and that court will not be put in error on grounds not specified. Williams v. State, Ala. Cr. App., 354 So. 2d 48, cert. denied, Ala., 354 So. 2d 53 (1978).

AFFIRMED.

All the Judges concur.

* * *

Ex parte J. L. STRINGER.

78-534.

Supreme Court of Alabama.

June 22, 1979.

Certiorari to the Court of Criminal Appeals, 372 So. 2d 378.

BLOODWORTH, Justice.

WRIT DENIED.

TORBERT, C.J., and FAULKNER, ALMON and EMBRY, JJ., concur.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Sheriff Snead and Forrest Dobbins, Petitioners, do hereby certify that on this 28th day of May, 1981, I did serve the requisite number of copies of the foregoing on the Attorney for J. L. Stringer, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

Honorable Charles A. Sullins
Attorney at Law
206 Randolph Avenue, S.E.
Huntsville, Alabama 35801

/s/
JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130

Office-Supreme Court, U.S.
FILED
AUG 21 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-2017

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROY SNEAD, JR., SHERIFF, AND
FORREST DOBBINS, CLERK OF THE
CIRCUIT COURT OF
CALHOUN COUNTY, ALABAMA,

Petitioners

V.

J. L. STRINGER, ALSO KNOW AS
REV. JUDGE L. STRINGER,

Respondent

RESPONDENT'S BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES A. SULLINS
206 Randolph Avenue, S.E.
Huntsville, Alabama 35801
Telephone (205) 539-9571

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE FACTS

Respondent (hereinafter referred to as Stringer) was the Mayor of Hobson City, Alabama during all times relevant to this case. He was indicted by the October 1977 Grand Jury of Calhoun County, Alabama on a two-count indictment charging forgery and embezzlement. Both charges were based on a check dated October 31, 1974 drawn on the banking account of Hobson City and made payable to "William Malone". The face of the check was signed by Stringer as Mayor and Margaret Bell as City Clerk. The check was endorsed in the names of William Malone and Stringer.

Approximately two or three months after Stringer had been indicted and some four or five months before trial, the prosecuting district attorney, Robert Field, (hereinafter referred to as district attorney) telephoned Stringer in his capacity as prosecuting attorney and obtained thereby an incriminating statement from Stringer (Respondent's Exhibit "A", pp. 120 and 123).

In prosecuting Stringer, the district attorney called five witnesses to the stand, including himself. Robert

Wayne Underwood was called as the state's first witness. He stated that he was an employee of the First National Bank of Anniston and had custody of the questioned checks (Respondent's Exhibit "A", p. 8). His was the only testimony to identify the checks and to confirm that they had passed through the account upon which they were drawn at the bank (Respondent's Exhibit "A", pp. 9-12). On cross-examination he stated that he knew nothing about the drawing, making of or endorsements on the checks and the facts surrounding same (Respondent's Exhibit "A", p. 12).

The state next called William A. Malone (Respondent's Exhibit "A", p. 13). He stated he had been an employee of Hobson City as the fire chief until approximately September 27, 1974 (Respondent's Exhibit "A", p. 14). He identified several checks as having been made out to him but stated he never endorsed the checks or received any money from them(Respondent's Exhibit "A", pp. 15-19). On cross-examination he testified that he did not know for a fact whether Stringer had signed the checks and knew nothing of the facts surrounding the issuance of same(Respondent's Exhibit "A", p. 23). He stated that

when he left his job in September 1974 he had no intent of coming back and had not told Stringer that his brother, Don, would work for him (Respondent's Exhibit "A", p. 24). Under further cross-examination a letter was introduced which was written by William Malone, specifically authorizing his brother, Don, to sign some checks he expected from the city after he left on September 27, 1974 (Respondent's Exhibit "A", p. 26). The rest of his testimony primarily dealt with biases that he may have had toward Stringer (Respondent's Exhibit "A", pp. 26-53).

The state next called Billy W. Moore (Respondent's Exhibit "A", p. 53). He testified that he was a special investigator with the Department of Industrial Relations for the State of Alabama and that in his capacity he had taken a taped statement from Stringer (Respondent's Exhibit "A", p. 54). The tape was admitted into evidence over strenuous objection by Stringer's counsel (Respondent's Exhibit "A", pp. 54-63). In said interview **Stringer denied that he had endorsed William Malone's name on any of the checks and did not know who had** (emphasis added) (Respondent's Exhibit "A", p. 74). Moore further testified as to an agreement Stringer and the Malones

had entered into whereby William Malone's brother, Don, was to work in William's stead and Don was to accept William's checks (Respondent's Exhibit "A", p. 75). Stringer stated that he received none of the funds from the checks and that the checks were paid for actual work done (Respondent's Exhibit "A", p. 78).

Next the state called Donald Ray Malone (Respondent's Exhibit "A", p. 85). He stated he was William Malone's brother and had been employed by Hobson City as the fire chief, a position his brother had earlier held, and police chief during the time the questioned checks were written (Respondent's Exhibit "A", p. 86). He stated that he recalled his brother leaving in September 1974 and he became the fire chief with no pay at the time (Respondent's Exhibit "A", p.88). He was shown each of the checks and he denied he had signed any of them or received any proceeds from them (Respondent's Exhibit "A", pp. 89-90). He later stated he had endorsed one check dated 12/24/74 and had given it back to Stringer but did not receive any proceeds from it (Respondent's Exhibit "A", p.94).

This evidence concluded the state's case except for the testimony of district attorney Field. He placed himself on the stand as his own last witness and testified as to an incriminating statement Stringer made, which was that he "Stringer" had endorsed William Malone's name to the back of the questioned check (Respondent's Exhibit "A", pp.119-120). This testimony was allowed over vigorous objection by Stringer's trial counsel. On cross-examination and voir dire the following crucial facts were revealed:

1. That the district attorney **initiated the call in his capacity as a prosecuting official** (Respondent's Exhibit "A", pp. 114, 123). (Emphasis added)

2. That the call was made approximately two or three months after Stringer had been indicted and pled not guilty and some four or five months before trial (Respondent's Exhibit "A", p. 114);

3. That the district attorney was aware Stringer had a lawyer, knew who the lawyer was, and made no communications with that lawyer to inform same that he was going to talk to Stringer (Respondent's Exhibit "A", p. 116);

4. That the district attorney at no time gave Stringer any **Miranda** or other warnings against self-incrimination (Respondent's Exhibit "A", p. 115);

5. That the district attorney was seeking handwriting samples which could be incriminating evidence without his attorney's advice (Respondent's Exhibit "A", pp. 118-120).;

6. That the district attorney specifically stated: "I think not having his attorney present would have put him (Stringer) at a disadvantage . . . " (Respondent's Exhibit "A", p. 124);

7. That the district attorney felt the fact that Stringer did not have his attorney's advice at the time of the conversation "would . . . have been against his (Stringer's) interests" (Respondent's Exhibit "A", p. 124); and

8. That Stringer would have been afraid not to talk to him (district attorney) and that he did not inform Stringer that he (Stringer) could terminate the conversation at any time (Respondent's Exhibit "A", pp. 126-128).

The district attorney was questioned by an assistant; however, at one point, while seated in the witness box, the district attorney personally objected to a question propounded to him by Stringer's counsel (Respondent's Exhibit "A", p. 125).

After the district attorney's testimony, he resumed personal prosecution of the case and the state rested. Counsel for Stringer moved for a directed verdict of acquittal on the ground that Stringer's signature on the back of the October 31, 1974 check had not been

authenticated and no evidence had been presented that Stringer had converted any funds to his own use. (Respondent's Exhibit "A", pp. 128, 129). Whereupon, the Court summarily denied the motion and Stringer was compelled to take the stand to attempt to explain the district attorney's testimony.

SUMMARY OF RESPONSE TO PETITIONERS ARGUMENT NO. 1

Petitioner admits that the district attorney could have obtained the handwriting by numerous methods other than direct contact with Stringer. To suggest that because Stringer was the Mayor of a small town the district attorney had a duty or owed a "courtesy" to Stringer to call him rather that utilize "proper legal process" is without merit. Stringer does not deny that the district attorney was entitled to "city records" which are surely public; however, as proper methods were available to obtain same, Stringer had a right to counsel when the call (contact) was made. This right was "fundamental". Prosecuting officials simply cannot get around the protective "zone of privacy" which is provided to an indirected accused under the guise of "courtesy" or social respect. The argument,

as presented, is clearly an effort to place a cloud over what was a counselless contract, which issue the Supreme Court has previously decided. Once the "muck" is cleared, no novel question is presented as Petitioner suggests. *UNITED STATES v. MILLER*, 425 U.S. 435, 48 L.Ed. 2d 71, 96 S.Ct. 1619 (1976); *ALDERMAN v. UNITED STATES*, 394 U.S. 165, 22 L.Ed. 2d 176, 89 S.Ct. 961 (1969); *CALIFORNIA BANKERS ASSN. v. SCHULTZ*, 416 U.S. 78, 39 L.Ed. 2d 850, 94 S.Ct. 1526; and *MASSIAH v. UNITED STATES*, 270 U.S. 201, 12 L.Ed. 2d 246, 84 S.Ct. 1119 (1964).

SUMMARY OF RESPONSE TO PETITIONERS ARGUMENT NO. 2

Once an individual has been indicted and the case has become accusatory rather than merely investigatory, it is improper for a prosecuting attorney to make a counselless contact of the indictee and the fruits thereof are inadmissable. *MASSIAH v. UNITED STATES*, 270 U.S. 201, 206, 12 L.Ed. 2d 246, 250, 84 S.Ct. 1119 (1964); *BREWER v. WILLIAMS*, 430 U.S. 387, 51 L.Ed. 2d 48, 88 S.Ct. 234 (1967); and *McLEOD v. OHIO*, 381 U.S. 356, 14 L.Ed. 2d 682, 85 S.Ct. 1556 (1965).

In concluding that the contact made by the district attorney with Stringer was a violation of Stringer's Sixth Amendment rights, the District Court stated: "The securing of an incriminating statement from a defendant who was represented by counsel after indictment in the absence or presence of defense counsel or a waiver thereof is a deprivation of such a defendant's right to counsel . . . (District Court's Memorandum Opinion, p. 2; Respondent's Exhibit "A", pp. 6a, 7a).

The Court's decision is clearly within the bounds of the decided cases. "Interrogation" as used in *MASSIAH* is not limited merely to the act of asking questions, but can exist by the mere nature of the contact as "based on the defendant's preception(s), regardless of the intent of the state in making the contact. *RHODE ISLAND v. INNIS*, 446 U.S. 291, 64 L.Ed. 2d 297, 100 S.Ct. 1682 (1980); and *UNITED STATES v. HENRY*, 447 U.S. 264, 65 L.Ed. 2d 115, 100 S.Ct. 2183 (1980).

Respondent admits that *MASSIAH* does not reach those situations where a clear and knowing waiver of the right to counsel has been obtained; however, such a voluntary and knowing waiver is not presented in this case. *FARETTA v. CALIFORNIA*, 442 U.S. 806, 95

S.Ct. 2525, 45 L.Ed. 2d 562 (1975); and *JOHNSON v. ZERBST*, 304 U.S. 458, 28 L.Ed. 1461, 58 S.Ct. 1019 (1938).

A close analysis of all the underlying and critical facts surrounding the contact made by the district attorney reveals a clear violation of Stringer's Sixth Amendment right to counsel. The District Court's and the Fifth Circuit's decisions are well in line with the decided authority.

SUMMARY OF RESPONSE TO PETITIONERS ARGUMENT NO. 3

The ultimate consideration in every harmless error review is the overall effect the tainted evidence had on the verdict in relationship to the nature of the untained evidence. *CHAPMAN v. CALIFORNIA*, 386 U.S. 18, 176 L.Ed. 2d 705, 87 S.Ct. 824 (1967). In determining whether the admission of same was in fact harmless and that the evidence in no way contributed to the verdict, neither the District Court nor the Fifth Circuit could make such a conclusion. This is not in conflict with *JACKSON v. VIRGINIA*, [443 U.S. 307, 61 L.Ed. 2d 560, 99 S.Ct. 278 (1979)], which dealt with the standard of review to be applied when the ground for appeal is "insufficient evidence to support a verdict".

The state courts relied on both the district attorney's and Stringer's testimonies in order to find that the evidence was not harmless and was also sufficient for a verdict. *STRINGER v. STATE* (Cr. App. Ala. 1979), 372 So. 2d 378, 380, 383, Appendix "C", pp. 29a, 32a). This use was improper in that the district attorney's testimony was obtained in violation of a constitutional right and had a direct affect on the verdict. The testimony of Stringer was a fruit of the earlier erroneously admitted evidence. *FAHY v. CONNECTICUT*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963). The District Court's evaluations in this light were proper and not subject to reversal.

RESPONSE TO PETITIONERS ARGUMENT 1

Petitioners state as their first argument the following:

> "An indicted public official's right as an accused person do not extend to public records under the official's control by reason of his office." (Petitioner's Brief, p. 18)

The Petitioner presents said issue as a novel question which has never been decided by this Court. Clearly, this is not so. The agrument, as stated, simply conglomerates two underlying crucial

determinations, which have heretofore been addressed by this Court; those being:

1. The rights of an indicted person to counsel when contacted by police and prosecutorial officials; and

2. The rights an indicted person has to present discovery and use at trial of his papers, documents or otherwise, which, because of the nature of same, are "public" and not "private".

Stringer does not deny that "public" documents are subject to discovery and subsequent use at trial by prosecuting officials; however, the real question is the manner by which same can be obtained from the criminal defendant. The documents sought from Stringer most certainly could have been gathered by proper legal process (subpoena) or court order. This was the method used in *UNITED STATES v. MILLER*, 425 U.S. 435, 48 L.Ed. 2d 71, 96 S.Ct. 1619 (1976).

The Petitioners attempt to cloud the distinctiveness of the underlying issues by use of the following phraseology:

> "When seeking public records of small towns, such as Hobson City, Alabama, one normally contacts the mayor. If one were to contact anyone else, he would be referred to the mayor. Thus, if the mayor had not been under indictment, no questions would have been raised by the district attorney's call; it would

have been the normal natural thing to do." (Petitioner's Brief, p. 19)

"Mayor Stringer chose to remain active in his office during the pendency of the indictment. It was this situation which led the district attorney to call Mayor Stringer about the city records." (Petitioner's Brief, p. 18)

There is no basis for such general conclusions in the record. At no time did the district attorney state the above were his reasons for making the call nor did he state that the call was motivated by some "courtesy" he owned Stringer. There were many ways to obtain the desired handwriting exemplars. The Malone brothers actually testified for the state; their handwriting samples were easily accessable. A subpoena could have produced any city records the district attorney desired and a court order could have made Stringer give handwriting samples. Stringer has never stated that these would not be proper ways to obtain the desired evidence; however, the petitioner insists that "something" required the district attorney to call Stringer, personally, rather than utilize proper legal process.

In argument to the Fifth Circuit Court of Appeals, petitioner labeled this method of obtaining records a "courtesy call" and characterized the constitutionality of such as follows:

"Since the district attorney could have seized these records without the Mayor's permission (United States v. Miller, 425 U.S. 435, 48 L.Ed. 2d 71, 96 S.Ct. 1619 (1976), the district attorney's call was in the nature of a courtesy due Mayor Stringer's office." (Petitioner's Brief in the Fifth Circuit Court of Appeals, p. 12) (Emphasis Added)

. . . . .

" . . . the district attorney would not have had to obtain Mayor Stringer's lawyer's consent to examine the city records. The records in question did not belong to Mayor Stringer; they were public records open to reasonable inspection by anyone. Therefore, the district attorney could have walked into city hall, examined the records and seized such exemplars as he needed. He would not even have had to obtain a search warrant, since the Mayor certainly had no reasonable expectation of privacy with regard to public records . . . "

"Why, then *did the district attorney not ignore the mayor and examine the records on his own? Why did he call the mayor and ask for permission which the district attorney did not need?* The answer is that in addition to being an indictee, the accused was a mayor. A prosecutor who is called on to prosecute a public official such as a mayor, a legislator or a judge must strike a delicate balance between two paradoxical considerations. On the one hand, the accused is an individual who has the same rights, duties and liabilities as any other citizen. On the other hand, the accused holds an office conferred on him by the people, an office whose dignity should be kept intact for the future. *Therefore, the prosecutor who finds himself in this position should be scrupulously courteous to the accused office holder, because of the dignity of his office, while at the same time the prosecutor vigorously pursues the prosecution.*

> Viewed in this context, the district attorney's call in *this case makes perfectly good sense; it was a courtesy call.*" (Petitioner's Brief to the Fifth Circuit Court of Appeals, pp. 20-21) (Emphasis Added)

This argument simply put begs the Court to give an accused, who is a public official, the constitutional right to "courtesy calls", which right would supersede the indicted criminal defendant's Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination. Such an argument is incredulous and without merit.

As the petitioner, by arguments presented in its briefs, admits that the evidence sought could be obtained by various lawful means, the real question then becomes the right of an indicted person to counsel when questioned by a prosecuting official.

This Court in *ALDERMAN v UNITED STATES*, 394 U.S. 165, 22 L.Ed 2d 176, 89 S.Ct. 961, 967 (1969) stated that its decision did "not deprecate Fourth Amendment rights. The security of persons and property remains a fundamental value which law enforcement officers must respect". The "courteous" thing for the district attorney to have done would have been to respect Stringer's "fundamental" right to counsel. *MILLER*, supra, 96 S.Ct. 1619, 1623, 1625,

which the petitioner cites, this Court espoused that generally "governmental investigative activities" would be proper as long as they did not intrude into a "zone of privacy" or "into the security a man relies upon when he places himself or his property within a constitutionally protected area". As Stringer had been indicted he was within a "constitutionally protected area", that being his right to counsel; not some right to a courtesy call.

As proper legal process existed to obtain the desired handwriting samples, which did not affect Stringer's right to counsel, and did not place the district attorney in a position whereby he could obtain incriminating evidence, petitioners' argument number 1 is without merit.(See: *CALIFORNIA BANKERS ASSN. v. SHULTZ*, 416 U.S. 78-79, 39 L.Ed. 2d 850, 94 S.Ct. 1526). The argument is merely a means by which to disguise the real injustice, that being the counselless contact which is discussed under petitioners' argument number 2 hereinafter.

RESPONSE TO PETITIONERS ARGUMENT NO. 2

As their second argument the petitioners stated:

"The *Massiah* rule does not apply to statements which are not intentionally elicited."

Petitioners suggest that the ruling in this case is contrary to prior decisions of this Court. When the argument is "factually" qualified, such contention is without merit.

First, the lower courts have never stated that *MASSIAH* bars all counselless contracts. The District Court properly concluded that "the securing of an incriminating statement from a defendant who was represented by counsel after indictment *in the absence of presence of defense counsel or a waiver thereof* is a deprivation of such a defendant's right to counsel . . . " (District Court's Memorandum Opinion, p. 2; Respondent's Exhibit "A", pp. 6a, 7a) (Emphasis Added). Certainly, if a waiver is obtained such contracts might be proper.

Under respondent's "Statement of Facts" at least ten separate facts are listed, which succiently demonstrate the nature of this contract by the district attorney. Without reference to the records they are:

1. The call (contact) was made several months post- indictment.
2. The contact was *initiated and made* by the chief prosecuting official to the defendant.

3. Prior to the time the contact was made, the district attorney knew that the defendant was represented by counsel and admitted that he made no effort to contact same.

4. The contact was made in reference to the case for which the defendant had been indicted and not some other independent case or investigation.

5. The information sought by way of the contact could be "incriminating".

6. At no time during the contact was the defendant told any rights, including *Miranda* rights. Defendant never waived his constitutional rights.

7. The district attorney *knew that the contact* put the *defendant at a disadvantage* as he had no attorney present.

8. The district attorney *knew* that the contact *was against the defendant's interests*.

9. The district attorney knew the defendant would be afraid not to talk to him.

10. The district attorney never told the defendant that he did not have to talk to him or that he (Stringer) could terminate the conversation at any time.

When these crucial facts are viewed in light of this Court's decisions, the ruling herein is clearly in line with the decided authorities.

Petitioner contends that the call did not constitute "interrogation" as used in *Massiah*. In defining said term, this Court recently stated in *RHODE ISLAND v. INNIS*, 446 U.S. 291, 64 L.Ed. 2d

297, 100 S.ct. 1682, 1689, 1690 (1980) the following:

> "The term 'interrogation' under Miranda refers not only to express questioning, but also to any other words or actions on the part of the police (other) than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect. The later portion of this definition *focuses primarily upon the perceptions of the suspect, rather than the intent of the police.*" (Emphasis Added)

As *INNIS* involved pre-indictment contacts, surely its arm reaches more firmly around post-indictment situations. The district attorney knew he was placing Stringer at a disadvantage and that same was against his interests. He initiated a contact that he knew Stringer would be afraid to stop. Although his stated intent may have been without fault, a review of the "influencing facts" of same discloses a stated initiated contact, which was ripe for self-incrimination. In *UNITED STATES v. HENRY*, 447 U.S. 264, 65 L.Ed 2d 115, 100 S.Ct. 2183, 2189 (1980), this Court held that a statement made by an indicted defendant to a fellow inmate, who was an undercover agent, was invalid, even though the defendant initiated the conversation. The Court concluded that "by intentionally creating a situation likely to induce Henry to make incriminating statements without the

assistance of counsel, the government violated Henry's Sixth Amendment right to counsel". For the Sixth Amendment to apply the state does not have to be grilling the defendant or actually asking questions of same. In *McLEOD v. OHIO*, 3181 U.S. 356, 14 L.Ed. 2d 682, 85 S.Ct. 1556 (1965), the defendant made incriminating statements while riding with an assistant prosecting attorney and a sheriff. Same occurred after indictment but before the defendant had counsel. His statements were made willingly and the defendant never stated he wanted an attorney. *He was cooperating in a search for evidence of the crime.* The state court attempted to distinguish McLeod's situation from that of *Massiah* in that he had made the volunteered statements to known prosecuting officials. This Court reversed, citing *MASSIAH*, supra. The facts of this case are very similar to McLeod's. District Attorney Field was seeking evidence in Stringer's case to be used against Stringer. He solicited Stringer's cooperation in gathering possibly incriminating evidence by phone call, during which Stringer made an incriminating statement even though he may not have been under direct "interrogation".

The case law is clear that once a defendant has been indicted, he is entitled to have counsel present when he is questioned about anything, especially if the questioning is planned or instigated by some government official. *BREWER v. WILLIAMS*, 430 U.S. 387, 51 L.Ed. 2d 438, 97 S.Ct. 1232 (1977). In *BEATTY v. UNITED STATES*, 389 U.S. 45, 19 L.Ed 2d 48, 88 S.Ct. 234 (1967), an indicted defendant initiated and set up a meeting with an undercover agent and made incriminating statements. Same were completely voluntary and there was no interrogation. This Court held *MASSIAH* applicable.

Stringer admits that some cases have held admissable the introduction of an incriminating statement made by an indicted defendant, but only upon a showing that the defendant waived his right to counsel and that the defendant was made aware of such right from the onset of the contact. *FARETTA v CALIFORNIA*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 562 (1975); *JOHNSON v. ZERBST*, 304 U.S. 458, 58 S.Ct. 1019 28 L.Ed. 1461 (1938); and *CARNLEY v. COCHRAN*, 369 U.S. 506, 8 L.Ed. 2d. 70, 825 S.Ct. 884 (1962). Stringer was never informed of any right he had to counsel at the time the contact was made;

therefore, no waiver question presents itself for review. The rulings of the District Court and the Fifth Circuit Court of Appeals are clearly in line with the cited authorities of this Court.

RESPONSE TO PETITIONERS ARGUMENT NO. 3

The petitioners state as their last argument:

> "The District Court erred in setting aside the state court finding of harmless error on state law grounds."

Petitioner's argument on harmless error relies heavily on the fact that Stringer testified at the trial to essentially the same facts to which the district attorney testified. The record is clear that Stringer did so only in an effort to explain away the district attorney's testimony. The argument as presented cites only one case, that being *JACKSON v. VIRGINIA* [443 U.S. 307, 61 L.Ed. 2d 560, 99 S.Ct. 2781 (1979)], which dealt with the standard of review to be applied when the ground for appeal is insufficient evidence to support a conviction. That case in no wise dealt with constitutional "harmless error" considerations.

The real question is what affect did the district attorney's testimony have on the verdict. Petitioner relies on the findings of the state court in *STRINGER v. STATE* (Cr. App. Ala. 1979), 372 So. 2d 378; Appendix "C"). That court relied heavily on Stringer's testimony at trial, which occurred **after** the state rested, in its recitation of the facts and never referenced the district attorney's evidence. *STRINGER v. STATE* (Cr. App. Ala. 1979), 272 So. 2d 378, 380; Appendix "C", p. 29a) Further, the petitioner argues that the "state courts considered the sufficiency of the evidence and found it sufficient without the district attorney's testimony." (Petitioner's Brief, p. 30) The only statement the Alabama courts made that even remotely comes close to petitioners' argument was a follows:

> "Appellant contends that the evidence was insufficient to show that municipal funds were unlawfully converted. *The State's evidence was that funds were improperly drawn from a city account by appellant for a non-existent obligation.* The custodian of the records for the First National Bank of Anniston testified as to the city's account with that bank and identified the check in question as being drawn on the city's account A microfilmed copy of the October 31, 1974 check was admitted into evidence. Therefore, we think the evidence was sufficient to show a fraudulent conversion of municipal funds." *STRINGER v. STATE* (Cr. App. Ala. 1979), 372 So. 2d 378, 383, Appendix "C", p. 32a).

If anything, this statement shows that the court relied on all the state's evidence including the district attorney's. Nothing suggests otherwise. The petitioners have attempted to read between the lines.

Respondent has recited the material facts in detail under its "Statement of Facts". As the District Court concluded in its analysis of the facts, the critical question was what affect did the district attorney's testimony have on the ultimate verdict. Said court stated that it could not say the effect of same was harmless.

The basis for the test of harmless constitutional error was stated in *CHAPMAN v. CALIFORNIA*, [386 U.S. 18. 17 L.Ed. 2d 705, 710, 711, 87 S.Ct. 824 (1967)] as "whether there *is a reasonable possibility that the evidence complained of might have contributed to the conviction* and requiring the beneficiary of a constitutional error *to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained*. . . the court must be able to declare a belief that it (the testimony or evidence) was harmless beyond a reasonable doubt." (Emphasis added)

The harmless error doctrine, as espoused in

CHAPMAN has been often litigated and the consequences of even the most recent rulings is to firmly implant a burden on the attorney general's office to prove that the testimony of District Attorney Field was harmless beyond a "reasonable doubt" and had no positive influencing effect on the jury verdict. The circuit courts have generally accepted such a burden of proof. See: *UNITED STATES v. ANDERSON*, 523 F.2d 1192 (5th Cir. 1975); *CARVEY v. LeFEVRE*, 611 F.2d 18, 23 (2nd Cir. 1979) ["No reasonable possibility that the jury would have reached a different verdict if the evidence were excluded"]; *UNITED STATES v. YEAGER*, 476 F.2d 613 (3rd Cir. 1973); *UNITED STATES v. HARTMAN*, 627 F2d 7 (6th Cir. 1980); and *EBERHARDT v. BORDENKIRCHER*, 605 F.2d 275 (6th Cir. 1975) ["beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant"].

A review of the evidence leaves but one conclusion-that being the importance of the district attorney's testimony. The District Court concluded that prior to District Attorney Field's testifying, "the prosecution had not established its case against (Stringer) except

in an extremely tenuous fashion", and further "due to the fact that without the evidence obtained by the prosecuting official the state's case would have likely failed, it is impossible to conclude that the obtaining of this statement was harmless error" (District Court's Memorandum Opinion, p. 3; Appendix "A", p. 7a). Such conclusions are clearly in line with *CHAPMAN*.

Secondly, the petitioners, in evaluating the evidence and its relationship to the harmless error rule, constantly alluded to the fact that Stringer testified to essentially the same facts as the district attorney. Stringer was put on as a defense witness. The state had already rested its case. After the district attorney had testified, Stringer had no choice but to tell his side. Defense counsel made virogorus objections both to the district attorney's testifying as a witness for the state. (Respondent's Exhibit "A", pp. 113-118, 119) and, secondly, as to the nature of the district attorney's testimony regarding the incriminating statement. (Respondent's Exhibit "A", pp. 113-118, 120).

Everything possible that could be done at the trial to prevent the district attorney from testifying to the incriminating statement was done and was overruled

by the trial court. Once the tainted testimony was in, the entire nature of the case changed, both in terms of the strength of the State's case and in terms of defense tactics.

In *FAHY v. CONNECTICUT* (375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963), this court spoke directly to this point. In that case the defendant was convicted of willfully injuring a public building by painting swastikas on a synagogue. At the trial a can of paint and a paint brush were introduced into evidence after being obtained by an illegal search and seizure. The defendant objected to the intorduction of same at the trial. The defendant later took the stand and tried to explain his acts. In holding that the tainted testimony (introduction of the brush and paint can) was not harmless, even though the defendant testified that he committed the crime, the court stated:

> "Nor can we ignore the cumulative prejudicial effect of this evidence upon the conduct of the defense at trial. It was only after admission of the paint and brush and only after their subsequent use to corroborate other state's evidence and only after introduction of the confession that the defendants took the stand, admitted their acts, and tried to establish that the nature of these acts was not within the scope of the felony statute under which the defendant had been charged . . . We merely note this course of events as another indication of the prejudical effect on

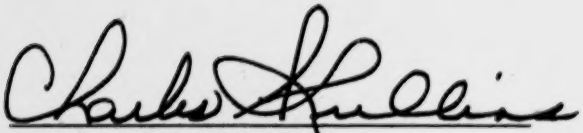
the erroneously admitted evidence." *FAHY*, supra, pp. 232-233.

In accordance with *FAHY*, Stringer's testimony is not to be considered; and, even if it were, arguendo, it cannot be said that the district attorney's testimony had no effect on the verdict. Stringer's testimony was merely a fruit of the poisonous tree. When considered under the proper case authority, the petitioners' third argument is without merit.

CONCLUSION

In conclusion, Stringer submits that this case does not present any question of Federal Constitutional Law which has not been or ought to have been decided by this Court. The decision of the Court of Appeals is clearly in line with the decided opinions of this Court and in no wise conflicts with same. The Petitioner's request that a Writ of Certiorari is, accordingly, due to be denied.

Respectfully submitted,

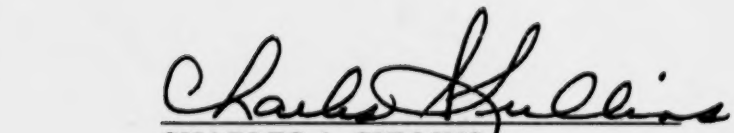


CHARLES A. SULLINS
Attorney for Respondent (Stringer)
206 Randolph Avenue, S.E.
Huntsville, Alabama 35801
Telephone: (205) 539-9571

CERTIFICATE OF SERVICE

I, Charles A. Sullins, Attorney, a member of the Bar of the Supreme Court of the United States, and the attorney for the Respondent, Judge L. Stringer, do hereby certify that on this 20th day of August, 1981, I did serve the requisite number of copies of the foregoing on the Attorney of record for the Petitioners, Sheriff Snead and Forrest Dobbins, by mailing same to him, first class postage prepaid and addressed as follows:

Office of the Attorney General
Hon. Joseph G. L. Marston, III
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130



CHARLES A. SULLINS
ATTORNEY AT LAW

ADDRESS OF COUNSEL
206 Randolph Avenue, S.E.
Huntsville, Alabama 35801
Telephone: 205-539-9571

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

NO. 80-2017

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROY SNEAD, JR., SHERIFF, AND
FORREST DOBBINS, CLERK OF THE
CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA,

Petitioners

V.

J. L. STRINGER, ALSO KNOWN AS
REV. JUDGE L. STRINGER,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF AND ARGUMENT OF PETITIONER

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONERS

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REPLY ARGUMENT

I.

ON THE MASSIAH ISSUES

Mayor Stringer frankly admits that the Rule of Massiah v. United States (377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1119 [1964]) does not bar all counselless contacts between prosecuting officials and indictees. However, he vehemently denies a contrary position by himself or the District Court. Then, having denied the position, he advances it. Consider the following random quotations from Mayor Stringer's brief:

> ". . .Stringer had a right to counsel when the call (contact) was made. . . ." (Resp. Br. p. 7)

> ". . .The argument [of Petitioner] as presented, is clearly an effort to place a cloud over what was a counselless contact...." (Resp. Br. pp. 7-8)

> ". . .The argument [of Petitioner]. . .simply conglomerates two underlying crucial determinations, which have heretofore been addressed by this Court; those being:
>
> 1. The rights of an indicted person to counsel when contacted by police and prosecutorial officials...." (Resp. Br. pp. 11-12)

The Petitioner must argue this way since, if it is conceded that any counselless contact is permissible, the most obviously permissible one would be a contact with an indicted public official concerning public records.

For reasons which this writer cannot grasp, this sort of "double think" has characterized this case throughout its history in the Federal Courts. Consider, for example, the District Court's holdings: (1) That the District Attorney had no improper motive in making the telephone call, but (2) violated Mayor Stringer's Constitutional rights by securing an admission against interest.

This Honorable Court has never had any occasion to address the question of whether an indicted public official's Sixth Amendment rights extend to public records under his official custody. Neither Massiah, supra, nor any case following it came close to the facts in this case. Another way of putting this question is suggested by Mayor Stringer: Whether a "zone of privacy" (Resp. Br. pp. 7 and 16) is created around an indicted public official which extends to his official records. Mayor Stringer argues that there were other ways to obtain these records, but this does not answer the question of whether the way used was proper. The other ways would have raised other questions. For example, a subpoena would have been delivered by the sheriff and would likewise have involved a counselless contact. Clearly this case presents an important novel question

In Massiah, above, this Honorable Court wrote:

> ". . .We hold that the petitioner was denied the basic protections of that [Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he was indicted and in the absence of his counsel. . . ." (377 U.S. 201, 206, 12 L. Ed. 2d 246, 250) (Emphasis supplied)

This is the Massiah Rule on the basis of which a new trial was ordered for Mayor Stringer. Since Massiah this Honorable Court has applied the Rule several times and has never deviated one way or the other from the intentional elicitation requirement. See, for example, Brewer v. Williams (430 U.S. 387, 399 ff. 51 L. Ed. 2d 424, 436 ff, 97 S. Ct. 1232 [1977]) and United States v. Henry (___U.S.___, 65 L. Ed. 2d 115, 122 ff., 100 S. Ct. ___ [1980]) In holding that the District Attorney, having no improper motive, vio-

lated Mayor Stringer's rights by hearing Stringer's unelicited admission, the lower Federal Courts clearly ruled contrary to the prior opinions of this Honorable Court.

II.

ON HARMLESS ERROR

What error could be more harmless than evidence proving a fact admitted by the adverse party and material primarily to a charge on which the party is acquitted? The harmlessness of such evidence is too obvious to merit discussion. In order to get around this obvious point, the District Court ignored some evidence and minimized the effect of the rest, rejected the State Court implied finding that the State's evidence was sufficient to take both charges to the jury and ruled contrary to the prior decisions of this Honorable Court. E.g. Jackson v.

Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781 (1979).

CONCLUSION

In conclusion the Petitioners again respectfully submit that this case presents an important question of Federal Constitutional Law which has not been but ought to be decided by this Honorable Court and conflicts with prior opinions. For these reasons the Petitioners again pray that this Honorable Court will issue the writ of certiorari and review the decision and opinion of the Honorable Court of Appeals and on such review will reverse the decision of said Court.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Sheriff Snead and Forrest Dobbins, Petitioners, do hereby certify that on this ___ day of August, 1981, I did serve the requisite number of copies of the foregoing on the Attorney for J. L. Stringer, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

Honorable Charles A. Sullins
Attorney at Law
206 Randolph Avenue, S.E.
Huntsville, Alabama 35801

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130